

NORTH DAKOTA DEPARTMENT OF TRANSPORTATION SPECIAL PROVISION: DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

PROJECT _____

RACE-CONSCIOUS GOAL: The Disadvantaged Business Enterprise (DBE) goal for this project is: ____%

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INTRODUCTION

49 Code of Federal Regulations Part 26 (CFR) states that the contractor, subrecipient, or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. Contractors shall carry out applicable requirements of 49 CFR Part 26 in the solicitation, award, and administration of USDOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.

In addition, Title VI assures that no person or group of persons may, on the grounds of race, color, national origin, sex, age, or handicap or disability, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any and all programs or activities administered by the Department. For information regarding Title VI, see the 2001 DBE Program.

The two paragraphs above apply to every contractor on the project, including every tier of subcontractor. It is the prime contractor's or subcontractor's responsibility to include the two above paragraphs in every subcontract.

In this special provision:

“Apparent low bidder” means the bidder whose bid is read as low bid at the bid opening.

“Contractor” means ALL DBE (including MBE and WBE) and non-DBE firms, including prime contractors, subcontractors (under/over \$500,000), suppliers, brokers, vendors, regular dealers, and manufacturers.

“Prime contractor” means bidders or contractors who are submitting proposals on this project, regardless of the size of the project.

“Quoter” means a DBE and non-DBE subcontractor (under/over \$500,000), supplier, broker, vendor, regular dealer, or manufacturer who submits quotes to another contractor.

“Subcontractor quoting over \$500,000” means a subcontractor whose quote is over \$500,000 on

any project and who is not a supplier, broker, vendor, regular dealer, or manufacturer. All aggregate providers are considered subcontractors, regardless of the amount of their quote.

“Aggregate providers” are considered subcontractors rather than suppliers, regardless of the amount of their quote.

“Broker” means an agent who negotiates contracts of purchase, work, lease, or sale; or buys and sells goods; or negotiates between buyers and sellers; but without having custody of the property. A broker may assist in the procurement of facilities, materials, or supplies required for the performance of the contract. A broker is not regarded as a supplier, manufacturer, or regular dealer for the purposes of this program.

“Manufacturer” means a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

“Regular dealer” means a DBE firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials supplies, articles, or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.

- To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.
- A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided above if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.

“Supplier” means a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles, or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.

- The firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.
- “Materials” is defined as steel, petroleum products, concrete, asphalt, and other construction materials. Aggregate is not included in this definition of “materials.” Aggregate providers are considered subcontractors rather than suppliers, regardless of the amount of their quote.

“Race-conscious project” means one that is focused specifically on assisting only DBEs, including women-owned DBEs.

“Race-neutral project” means one that is, or can be used to assist all small businesses. For the purposes of this part, race neutral includes gender-neutrality.

PREBID REQUIREMENTS

IN ORDER FOR THE BIDDER'S PROPOSAL TO BE CONSIDERED RESPONSIVE, ONE OF THE FOLLOWING MUST BE ACHIEVED PRIOR TO THE BID OPENING:

- **THE DBE GOAL LISTED ON PAGE ONE OF THIS SPECIAL PROVISION IS MET.** (Submit the required information on Form A at the time of bid submittal); or
- **THE DBE GOAL IS PARTIALLY MET AND THE BIDDER DEMONSTRATES GOOD FAITH EFFORTS (GFE) AS FOUND BELOW.** (Submit the required information on Form A at the time of bid submittal); or
- **NO DBE PARTICIPATION IS SUBMITTED AND THE BIDDER DEMONSTRATES GOOD FAITH EFFORTS AS FOUND BELOW.**

GOOD FAITH EFFORTS

The following is a list of actions to be taken or documentation to be provided by all bidders (including DBE primes) to obtain DBE participation. Efforts shall include, but are not limited to, the following steps:

1. ADVERTISE

- A. The prime contractor must place an advertisement soliciting DBE participation in either general circulation media or the supportive services newsletter before the bid opening.
- B. Prime contractors who submit their proposals by mail must indicate in their advertisement that they will be mailing their bid, must provide a date and time by which all quotes must be received for consideration, and must indicate where quotes should be sent.
- C. Advertisements placed in general circulation media must be run once at least seven calendar days before the bid opening date. "General circulation media" means a newspaper in the area of a project or a trade association publication such as The Construction Bulletin.
- D. The supportive services newsletter is published two weeks before each bid opening. Request for ads in the newsletter must be received, in writing, by the supportive services contractor no later than noon (Central time), 2 weeks before the bid opening date. The address of the supportive services contractor is: Jim Laducer, Laducer & Associates, Inc., 2001 Missouri Drive, Mandan, ND 58554, phone (701) 667-1980, fax (701) 667-2970.

2. OFFER OF ASSISTANCE

- A. In the advertisement and all other phases of pre-bid activities, the prime contractor must offer assistance to disadvantaged businesses in the areas of (but not limited to) interpreting plans, preparing proposals, providing advice to obtain bonding and insurance, project scheduling, pit and batch plant locations, etc. After the bid opening, the apparent low bidder must document that the offer of assistance appeared in the advertisement.

3. ASSIST DISADVANTAGED BUSINESSES

- A. The prime contractor and subcontractors must respond to any requests, from disadvantaged businesses that are submitting quotes, concerning: interpreting plans; preparing proposals; providing advice to obtain bonding and insurance; quantities; expected overtime, project scheduling; pit information (location, length of haul, type of road); method of measurement (seeding by the mile or acre, hauling by the ton-mile or by the hour, etc); payment schedule; items of work included in the quote; or any other project-related issues. After the bid opening, the apparent low bidder must state, in writing, whether such discussions were requested, and must report and document any assistance provided.

4. GUIDELINES FOR SUBMITTING QUOTES TO BIDDERS

- A. All businesses are **strongly encouraged** to follow these guidelines when quoting.
1. Indicate the date of the bid opening, job number, and project number being quoted.
 2. Include bid item numbers and units or quantities.
 3. Use bid items and quantities from the proposal rather than from the Notice to Bidders.
 4. Show all calculations on the quote.
 5. Indicate whether mobilization is included; cost of bond, if required; and any other special conditions.
 6. Indicate if a quote does not include something required by the specifications for a particular bid item.
 7. Include on all trucking quotes the type and number of units available and their capacity.
 8. Provide separate quotes for each project (each quote on a separate page).

5. SIGN IN

- A. **DBE and non-DBE prime contractors and subcontractors over \$500,000, (excluding suppliers, brokers, vendors, regular dealers, and manufacturers) unless submitting proposals by mail, are required to do the following:**
1. Between noon and 2 p.m. (Central) the day before the bid opening date, **must** either sign in, in person, or call in (701-258-7000) at the supportive services room at the Bismarck Doublewood Inn, 1-94 and Exit 159. The prime contractor and subcontractor over \$500,000 must provide information (location, phone, and fax numbers) about where they can be contacted by businesses wishing to submit quotes to them between 2 p.m. and 8 p.m. that same day.
 2. Designate at that time which jobs they are bidding.

3. Between 2 p.m. and 8 p.m. (Central) the day before the bid opening the prime contractor and subcontractors over \$500,000 **must** have a representative available to receive and discuss quotes at the contact location or numbers as required in A-1 above.

B. DBE and non-DBE suppliers, brokers, vendors, regular dealers, and manufacturers are not required but are strongly encouraged:

1. Between 2 p.m. to 4p.m. (Central) the day before the bid opening, to stop by or call (701-258-7000) the supportive services room, at the Bismarck Doublewood Inn, I-94 and Exit 159, where copies of the prime contractors and subcontractors quoting over \$500,000 sign-in sheets will be available.

C. DBE and non-DBE subcontractors quoting under \$500,000 are not required but are strongly encouraged:

1. Between 2 p.m. to 6 p.m. (Central) the day before the bid opening, to stop by or call (701-258-7000) the supportive services room, at the Bismarck Doublewood Inn, I-94 and Exit 159, where copies of the prime contractors and subcontractors quoting over \$500,000 sign-in sheets will be available.

D. DBE and non-DBE subcontractors quoting over \$500,000 are not required but are strongly encouraged:

1. Between 2 p.m. to 8 p.m. (Central) the day before the bid opening, to stop by or call (701-258-7000) the supportive services room, at the Bismarck Doublewood Inn, I-94 and Exit 159, where copies of the prime contractors and subcontractors quoting over \$500,000 sign-in sheets will be available.

6. RECEIVE AND EVALUATE ALL QUOTES OFFERED

- A. All prime contractors and subcontractors are responsible for receiving and evaluating all quotes offered, regardless of whether the quotes are calculated by the ton-mile, hour, acre or square mile, and regardless of whether work elements intended to be subcontracted. It is not acceptable to limit the use of DBEs because a larger amount of work is intended to be subcontracted to a non-DBE. It is also not acceptable to require that quotes be given in a particular format. It is the responsibility of any person receiving quotes to convert the quotes to an acceptable format, if necessary.

7. DBE AND NON-DBE QUOTERS' RESPONSIBILITIES

- A. By the times listed in the chart below, the night before a bid opening, all DBE and non-DBE subcontractors (under/over \$500,000), suppliers, regular dealers, vendors, manufacturers, or brokers **must cease quoting**.
- B. By the times listed in the chart below, the night before a bid opening, all DBE and non-DBE subcontractors (under/over \$500,000), suppliers, regular dealers, vendors, manufacturers, or brokers **must submit a copy** of all phone or paper quotes given for each project. Quotes are either placed in the drop box in the supportive services room or faxed to the DBE Liaison Officer, 701/328-1965, 701/328-1420, 701/328-4545, 701/328-4928.

DBE & NON-DBE . . .	MUST CEASE QUOTING	MUST TURN IN QUOTES
suppliers, brokers, vendors, regular dealers, & manufacturers	4:00 p.m. (Central)	5:00 p.m. (Central)
subcontractors <u>under</u> \$500,000	6:00 p.m. (Central)	7:00 p.m. (Central)
subcontractors <u>over</u> \$500,000	8:00 p.m. (Central)	9:00 p.m. (Central)

- C. All subcontractors quoting over \$500,000 **must** attach a copy of their Form A to their quote when submitting it to the prime contractor.
- D. All quotes by DBE or non-DBE subcontractors, suppliers, regular dealers, vendors, or brokers for more than one bid item **must** indicate whether the bid items are **tied or not tied**.
- E. DBEs **must** state on their quote the dollar value of the work to be actually performed by their own forces or other DBEs they intend to use.

8. FORM A: MUST BE SUBMITTED AT THE TIME OF BID SUBMITTAL

- A. At the time of bid submittal, all prime contractors must complete Form A and attach it to their bid proposal.
- B. The prime contractors Form A must list all the DBEs intended for use on the project, including DBEs intended to perform work in all tiers of subcontracting. The prime contractor must also attach a Form A for all subcontractors over \$500,000.
- C. If the assigned goal has not been achieved and the prime contractor intends to do the work itself, the specific bid items and the DBE firms not used must be noted on Form A.
 - 1. Within 5 working days after the bid opening, the prime contractor must also provide to the Department a bid differential analysis between the DBE and non-DBE quoters.
 - 2. The information in this bid differential analysis must be used if the prime contractor who had planned to do the work subsequently chooses to subcontract.

9. FORM B: SUBMIT 10 WORKING DAYS OF BID OPENING

- A. Within 10 working days after the bid opening, all bidders must submit Form B or copies of all quotes received to the address in 10c below. Form B must include all tiers of subcontracting for the project.

10. FORM C: SUBMIT WITHIN 10 WORKING DAY AFTER THE BID OPENING

- A. Within 10 working days after the bid opening, the apparent low bidder **must** submit a Form C for each DBE listed on Form A to the address in C. below, unless NDDOT grants a time extension.
- B. No award will be made on a project until Form C's for each DBE are submitted to NDDOT. The contractor and DBE must both sign the form. Form C applies to all tiers of subcontractors working with DBE's.

- C. Forms Cs may be faxed to the DBE Liaison Officer, 701-328-1965 or mailed to the Civil Rights Office, NDDOT, 608 East Boulevard Avenue, Bismarck, ND 58505-0700.
- D. Signatures need not be original; faxed signatures are acceptable.
- E. If Form C contains additional pages or an attachment, each page or attachment must be signed by the DBE.
- F. If Form A and Form C contain different information (e.g., bid items numbers, quantities, or dollar amounts), the contractor or subcontractor must explain the difference in writing to NDDOT when submitting Form C.

11. DEADLINES FOR SUBMITTING DOCUMENTATION TO NDDOT

- A. Information must be submitted to the DBE Liaison Officer, North Dakota Department of Transportation, 608 East Boulevard Avenue, Bismarck, ND 58505-0700 as follows:
 - 1. Within five working days after the bid opening, the apparent low bidders must submit information on Steps 1, 2, 3, 5, and 6.
 - 2. Within five working days after the bid opening, any apparent low bidder who submits their proposal by mail must submit information on steps 1, 2, 3, and 6.
 - 3. Within 10 working days after the bid opening, the apparent low bidder must submit required Form Cs to the address above, unless NDDOT grants a time extension.
 - 4. Within 10 working days after the bid opening, **all bidders** must submit a completed Form B or copies of all quotes received for the project. Form B must include all tiers of subcontracting for the project.

12. DEMONSTRATION OF GOOD FAITH EFFORTS

- A. If the apparent low bidder did **not** meet the established DBE goal, good faith efforts documentation will be required as noted in 11 above and 13 below.

13. BID DIFFERENTIAL ANALYSIS

- A. The bidder **must** consider all bids offered. If DBE quotes were rejected based on the bid differential concept, this must be so noted by listing the DBEs name in the appropriate area on Form A. The bid differential analysis must be provided to the Department within 5 working days after the bid opening.
- B. Explanations will include each item bid by a DBE and be compared to like items bid by a non-DBE. The bidder will provide written documentation that clearly explains the difference in the bid calculations for each item of work affected, including a comparison by total dollar value and percentage of difference between the DBE and the non-DBE.
- C. If a DBE is used for a portion of a bid item, the prime contractor must show why the DBE was not used for the entire bid item. For example, if there is \$1 million worth of trucking in a project and the DBE will be used for \$100,000 of the trucking, the prime contractor must show why the DBE was not used for the remaining \$900,000 of the trucking.

If it is determined that the DBE quote should have been selected, the bidder will have

the opportunity to commit to using the DBE, resubmit a corrected Form A, and complete Form C's prior to award. The bidder is responsible for all additional costs incurred.

LIST OF DBE PARTICIPATION

Generally, the DBE Participation list is posted to the NDDOT web site:

<http://www.state.nd.us/dot/dbebidinfo.html> two working days after the bid opening. To request a paper copy of the DBE participation web site listing, contact DBE Liaison Officer, North Dakota Department of Transportation, 608 East Boulevard Avenue, Bismarck, ND 58505-0700, fax (701) 328-1965, phone (701) 328-2576.

PENALTIES FOR FAILURE TO PROVIDE REQUIRED DOCUMENTATION

Prime contractors and subcontractors are encouraged to discuss the requirements of this special provision with all bidders providing quotes on a specific project.

If the apparent low bidder fails to submit good faith efforts (GFE) documentation on a project in question, the Department will consider the bid non-responsive.

Prime contractors may be denied future quoting or bidding privileges if they failed to provide copies of all quotes or Form B.

Apparent low bidders may be denied future quoting or bidding privileges for failure to submit Form A and Form C as required.

EVALUATION OF GOOD FAITH EFFORTS (GFE)

After each bid opening, NDDOT will evaluate DBE participation on each project. If good faith efforts documentation is required or requested, it will be reviewed. If the apparent low bidder fails to meet GFE, the Good Faith Efforts Review Committee will recommend to the NDDOT Director that the bid be considered non-responsive.

ADMINISTRATIVE RECONSIDERATION

When a contractor misses any one step in the good faith efforts process, the Good Faith Efforts Review Committee makes a preliminary recommendation to not award. The process is:

- A. The contractor is contacted and allowed to comment or make explanations for the record, either in person or through a conference call.
- B. The contractor is told that the Department Director makes the final decision after considering the recommendations of the Good Faith Efforts Review Committee and the Department Deputy Director for Engineering.
- C. The contractor may choose to visit with the Director and Deputy Director for Engineering, but may not give them any information that has not been given to the Good Faith Efforts Review Committee.
- D. The Good Faith Efforts Review Committee makes a written recommendation to the Director, which includes comments provided by the contractor. The Committee also gives a copy of the written recommendation to the Deputy Director for Engineering.
- E. The Deputy Director for Engineering also makes a written recommendation to the Director.

F. The Director makes the final written decision.

G. The result of the reconsideration process is not administratively appealable to the Department of Transportation.

CONSTRUCTION PROGRESS CHART REQUIREMENT

Before the award of the contract, the apparent low bidder must create a construction progress chart for each DBE to be used on the contract (excluding oil haulers, suppliers, brokers, vendors, regular dealers, or manufacturers). The chart must state the type of work to be performed and when it will be performed.

The apparent low bidder must supply all charts to the Department and the appropriate chart to each DBE to be used on the contract.

AWARD OF CONTRACT

Contract award will be made to the bidder who submits the lowest responsive proposal meeting the prebid and preaward requirements.

PRE-JOB CONFERENCE

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00 It is the prime contractors responsibility to invite all DBEs listed on Form C to the pre-job conference.
00 If the DBE is unable to attend the pre-job conference it is the prime contractors responsibility to
00 provide a copy of the pre-job conference minutes to the DBE. In addition, it is the prime contractors
00 responsibility to discuss any project issues necessary for joint DBE program compliance on the part of
00 the prime contractor, non-DBEs subcontractors and their DBE subcontractors, manufacturers, or
00 regular dealers.

CONTRACT MONITORING, RESPONSIBILITIES, AND REPORTING

00 For the life of the project, prime contractors are responsible for the DBEs listed on Form C and for the
00 specific bid items or products that the bidder committed to during the pre-award process. It is the
00 prime contractors responsibility to monitor DBE performance on the project, to ensure the DBE
00 performs a commercially useful function and to ensure both the prime contractor and their
00 subcontractors, suppliers, manufacturers, and regular dealers comply with the requirements of this
00 special provision.
00 DBEs are responsible for performing a commercially useful function. Should the DBE be unable to
00 perform a commercially useful function or perform as stated on Form C it is their responsibility to
00 immediately notify the prime contractor orally and in writing. See pages 12 and 13 of this special
00 provision for information regarding commercially useful function.

The prime contractor must submit a completed copy of the DBE Participation Certification (SFN 14268), signed by the prime contractor and the DBE, to the project engineer upon completion of the contract to verify DBE participation. This includes DBE's used that were not included on Form A. The project will be monitored to ensure the DBE is performing a commercially useful function.

MAINTAINING RECORDS & TRACKING PAYMENTS

The Department will require prime contractors and subcontractors to maintain records and documents of payments to DBEs for three years following the performance of the contract. These records will be made available for inspection, upon request, by any authorized representative of the NDDOT or USDOT. This reporting requirement also applies to any certified DBE.

Prime contractors and subcontractors must keep a running tally of actual payments to DBEs for work committed to them at any time during the life of the contract. Prime contractors and subcontractors will be required to give NDDOT a record of payment by the tenth working day after the October-December quarter, the tenth working day after the January-March quarter, the tenth working day after the April-June quarter, and the tenth working day after the months of July, August, and September. The record must contain the name of the prime contractor or subcontractor, the project number, and the amount paid to the DBE for the reporting period only. Send the record to the DBE Liaison Officer, North Dakota Department of Transportation, 608 E. Boulevard Ave., Bismarck, ND 58505-0700.

NDDOT may perform interim audits of contract payments to DBEs to ensure that the actual amount paid to DBEs equals or exceeds the dollar amount stated on Form C.

NONFULFILLED OBLIGATIONS

The Department uses the following process when a contractor or DBE does not fulfill all of his or her obligations:

1. Nonfulfilled obligations by a contractor

- A. The prime contractor must immediately notify the Department, orally and in writing, if, during the good faith efforts process:

- œ 1. The prime contractor originally chose to perform tasks or bid items itself rather than use a DBE, but subsequently decided not to perform the tasks or bid items itself, **OR**
œ 2. Using the bid differential method, a non-DBE subcontractor or non-DBE supplier was originally chosen over a DBE, but subsequently the non-DBE did not perform.

- B. If the Department concurs that substitution is appropriate, the prime contractor will use the bid differential information supplied at the time of good faith efforts review. The prime contractor will offer the work to the lowest quoter. If that quoter cannot perform the work, the prime will continue offering the work to the next-highest quoter until one is found who can perform the work.

1. If, after completing this process, the prime contractor determines that none of the quoters in the bid differential is available for work, and the Department concurs the process has been followed, the prime contractor may solicit quotes from any other subcontractor or supplier.

- œ C. If the Department determines that a contractor should be sanctioned for not paying a DBE in a timely manner, or not having a DBE perform the specified dollar amount of work (subject to plan quantity changes), tasks or bid items, or for otherwise not fulfilling the requirements of this DBE special provision, the Department will provide written notice to the contractor informing them of the sanction.

Grounds for sanctions may also include, but are not limited to: repeated instances of nonfulfillment of contract, repeated instances of late contract-related payments, or documented fraudulent practices.

- D. The contractor has 14 calendar days from receipt of the certified notification to make a written request for a hearing.
- E. If the Department does not receive a written request, or if the contractor does not provide sufficient evidence at the hearing that the provisions have been met, the Department may:
1. Withhold the contractor's progress payment until the contractor complies with all DBE contract provisions

2. Deduct, from the contractor's progress payments, the dollar amount of DBE participation committed to but not achieved by the contractor
3. Find the contractor in default
4. Disallow the contractor from bidding in one or more scheduled bid openings after the date the sanction is imposed
5. Take other corrective action determined by the Department to be appropriate, or
6. Any combination of the above.

2. Nonfulfilled obligations by a DBE

- A. If a DBE fails to fulfill all contract obligations to the contractor or to pay contract-related bills in a timely manner, the prime contractor is required to do the following:
 1. Immediately give oral and written notice to the project engineer of the DBE's nonfulfillment of commitments, stating the nature of the nonfulfillment.
 2. Provide written documentation to the project engineer that the DBE is unable or unwilling to perform the contract. Documentation may consist of a signed statement by the DBE that it is unable or unwilling to perform the contract. If the prime contractor cannot obtain such a document, the prime contractor must submit other documentation of contract nonfulfillment by the DBE.
 3. Immediately give oral and written notice to the DBE, stating the nature of the failure.
- B. If the Department concurs that the DBE is unable or unwilling to perform, the contractor will seek, through the DBE Liaison Officer or the Supportive Services Contractor, another DBE to complete the work. If another DBE is not available for work within (5) working days after the contractor informs the Department that the DBE is unable or unwilling to perform, or if the controlling items of work being performed by the contractor will be delayed because the DBE is unable or unwilling to perform, the contractor may complete the work. The prime contractor is responsible for any additional costs incurred as a result of any DBE's failure to perform.
- C. If the Department determines that the DBE should be sanctioned for nonfulfillment of a contract, **for failure to pay contract-related bills in a timely manner, for failing to perform a commercially useful function, for failure to notify the prime contractor orally and in writing if they are unable to perform a commercially useful function, or for otherwise not fulfilling the requirements of this DBE special provision** the Department will provide written notice to the DBE, informing the DBE of the sanction.
 1. The DBE has 14 calendar days, from receipt of the certified notification, to make a written request for a hearing.
 2. If the Department does not receive a written request for a hearing, or if the DBE does not provide sufficient evidence at the hearing that the provisions have been met, the Department may suspend the DBE and not allow the DBE to participate in one or more scheduled bid openings after the date the sanction is imposed.
 3. Grounds for sanctions may include, but are not limited to: repeated instances of nonfulfillment of contract, repeated instances of late contract-related payments, or

documented fraudulent practices.

MONITORING AND ENFORCEMENT MECHANISMS

The Department will bring to the attention of the USDOT any false, fraudulent, or dishonest conduct in connection with the program, so that USDOT can take the steps (e.g., referral to the Department of Justice for criminal prosecution, or referral to the USDOT Inspector General for action under Suspension and Debarment or Program Fraud and Civil Remedies rules) provided in §26.107. The Department will also consider similar action under its own legal authorities, including responsibility determinations in future contracts.

COUNTING DBE PARTICIPATION

This segment is provided in this special provision to help contractors and DBEs determine the dollar value of the work DBEs will actually be performing, as required in this special provision. The federal regulations on counting DBE participation toward the Department's annual goal, as provided in 49 CFR Part 26.55, is as follows:

1. When a DBE participates in a contract, the Department counts only the value of the work actually performed by the DBE toward DBE goals.
 - A. The Department counts the entire amount of that portion of a construction contract (or other contract not covered by paragraph 1B of this section) that is performed by the DBE's own forces. Included are the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).
 - B. The Department counts the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a USDOT-assisted contract, toward DBE goals, if the Department determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.
 - C. When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is also a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.
2. When a DBE performs as a participant in a joint venture, the Department counts a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals.
3. The Department counts expenditures to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract.
 - A. A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the

contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, the Department must evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.

- B. A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, the Department must examine similar transactions, particularly those in which DBEs do not participate.
 - C. If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, the Department must presume that it is not performing a commercially useful function.
 - D. When a DBE is presumed not to be performing a commercially useful function as provided in paragraph 3C of this section, the DBE may present evidence to rebut this presumption. The Department may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.
 - E. The Department's decisions on commercially useful function matters are subject to review by the concerned operating administration, but are not administratively appealable to USDOT.
4. The Department will use the following factors in determining whether a DBE trucking company is performing a commercially useful function:
- A. The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.
 - B. The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.
 - C. The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.
 - D. The DBE may lease trucks from another DBE firm, including an owner-operator certified as a DBE. The DBE leasing trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.
 - E. The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE does not receive credit for the total value of the transportation services provided by the lessee, since these services are not provided by a DBE.
 - F. For purposes of this paragraph (4), a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.

5. The Department counts expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:

- A. If the materials or supplies are obtained from a DBE manufacturer, count 100% of the cost of the materials or supplies toward DBE goals.

For purposes of this paragraph (5A), a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

- B. If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies toward DBE goals.

1. For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.

- a. To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.
- b. A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in this paragraph (5B[1]) if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.
- c. Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this paragraph (5B).

- C. With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, if the Department determines the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the materials and supplies themselves toward DBE goals, however.

6. If a firm is not currently certified as a DBE in accordance with the standards of subpart D of this part at the time of the execution of the contract, the Department does not count the firm's participation toward any DBE goals, except as provided for in §26.87(i).
7. The Department does not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward the Department's overall annual goal.
8. The Department does not count the participation of a DBE subcontractor toward the prime contractor's DBE achievements or the Department's overall annual goal until the amount being counted toward the goal has been paid to the DBE.

DISADVANTAGED BUSINESS ENTERPRISE PARTICIPATION (RC)

North Dakota Department of Transportation, Civil Rights Office
SFN 52750 (12-2002)

FORM A

Contractor		Phone
Job No.	Project No.	Bid Opening Date

At the time of bid submittal, all bidders must provide a list of the DBE firms intended for use on this project, including all tiers of subcontracting. The information provided may be submitted on this Form A or on a computer-generated form, giving the same information, attached to this Form A. If the bidder intends to use DBE quotes received from a subcontractor over \$500,000, the bidder **must** attach the subcontractor's Form A to the bidder's Form A.

PRINT ALL NUMBERS CLEARLY AND LEGIBLY.

- For each DBE firm, list the specific bid item numbers to be performed and the total dollar value.
 - If the DBE firm is going to do only a portion of a bid item (supply, haul, etc.), this **must** be so noted, in parenthesis, after the bid item number. **The bidder must state why the DBE was not used for the entire bid item.**
 - For DBE subcontractors, suppliers (regular dealers), and manufacturers, **list only the amount of work to be completed with each DBE's own forces.**
 - For DBE trucking firms, **list only the amount of hauling to be performed with each DBE's own trucks and employees;** or the fees or commissions earned on non-DBE leased trucks (see page 13, paragraph 4E, of this special provision).
- DBE bidders **must** list the work they will perform with their **own forces** and any work subcontracted to or materials purchased from other DBEs.
- If the information provided on Form C **differs** from the information provided on this Form A (bid item numbers, quantities, or dollar amounts), the apparent low bidder or subcontractor **must** provide, with the Form C, a written explanation for the difference.
- The apparent low bidder or subcontractor **must** use the DBEs listed for the intended work indicated on Form C.

If the assigned project goal has not been achieved, and the bidder intends to do work itself, the specific bid items and DBE firms not used must be listed here:

Bid Item Numbers or Products to be Supplied by the Bidder

DBE Firm	DBE Firm
DBE Firm	DBE Firm

DBE Firm	
List Specific Bid Item Numbers or Products to be Supplied	Total Dollar Value \$
Percent DBE will do with own equipment/forces = %	If Regular Dealer, X 60% = \$

DBE Firm	
List Specific Bid Item Numbers or Products to be Supplied	Total Dollar Value \$
Percent DBE will do with own equipment/forces = %	If Regular Dealer, X 60% = \$

DBE Firm	
List Specific Bid Item Numbers or Products to be Supplied	Total Dollar Value \$
Percent DBE will do with own equipment/forces = %	If Regular Dealer, X 60% = \$

FORM A (continued)

DBE Firm	
List Specific Bid Item Numbers or Products to be Supplied	Total Dollar Value \$
Percent DBE will do with own equipment/forces = %	If Regular Dealer, X 60% = \$

DBE Firm	
List Specific Bid Item Numbers or Products to be Supplied	Total Dollar Value \$
Percent DBE will do with own equipment/forces = %	If Regular Dealer, X 60% = \$

DBE Firm	
List Specific Bid Item Numbers or Products to be Supplied	Total Dollar Value \$
Percent DBE will do with own equipment/forces = %	If Regular Dealer, X 60% = \$

DBE Firm	
List Specific Bid Item Numbers or Products to be Supplied	Total Dollar Value \$
Percent DBE will do with own equipment/forces = %	If Regular Dealer, X 60% = \$

DBE Firm	
List Specific Bid Item Numbers or Products to be Supplied	Total Dollar Value \$
Percent DBE will do with own equipment/forces = %	If Regular Dealer, X 60% = \$

DBE Firm	
List Specific Bid Item Numbers or Products to be Supplied	Total Dollar Value \$
Percent DBE will do with own equipment/forces = %	If Regular Dealer, X 60% = \$

DBE FIRMS NOT USED DUE TO BID DIFFERENTIAL

DBE Firm	DBE Firm
DBE Firm	DBE Firm
DBE Firm	DBE Firm
DBE Firm	DBE Firm

Use additional pages, following the same format, if necessary.

The NDDOT DBE Liaison Officer can be contacted at:

Civil Rights Office
ND Department of Transportation
608 E. Boulevard Ave.
Bismarck, ND 58505-0700

digoe@state.nd.us
phone (701) 328-2576
fax (701) 328-1965

LIST OF BUSINESSES THAT SUBMITTED QUOTES (RC)North Dakota Department of Transportation, Civil Rights Office
SFN 52751 (Rev. 12-2002)

SP DBE -- Race-conscious

January 2, 2003

Page 17 of 19

FORM B

Contractor		Phone ()
Job No.	Project No.	Bid Opening Date

Within 10 working days after the bid opening, for each project, all bidders **must submit to the NDDOT Civil Rights Office either:**

- 1 a completed Form B or
- 1 copies of all quotes received

This includes information from all tiers of subcontractors for the project.

List below the names of all businesses, including subcontractors, suppliers, vendors, regular dealers, manufacturers, and brokers who provided you quotes for this project. This includes information from any large subcontractor who also provided you a quote on this project and their subcontractors, suppliers, vendors, regular dealers, manufactures, and brokers.

Name of Business	Contact Person	Phone ()
Mailing Address		Type of Work (See Reverse Side for Codes)
Name of Business	Contact Person	Phone ()
Mailing Address		Type of Work (See Reverse Side for Codes)
Name of Business	Contact Person	Phone ()
Mailing Address		Type of Work (See Reverse Side for Codes)
Name of Business	Contact Person	Phone ()
Mailing Address		Type of Work (See Reverse Side for Codes)
Name of Business	Contact Person	Phone ()
Mailing Address		Type of Work (See Reverse Side for Codes)
Name of Business	Contact Person	Phone ()
Mailing Address		Type of Work (See Reverse Side for Codes)
Name of Business	Contact Person	Phone ()
Mailing Address		Type of Work (See Reverse Side for Codes)
Name of Business	Contact Person	Phone ()
Mailing Address		Type of Work (See Reverse Side for Codes)
Name of Business	Contact Person	Phone ()
Mailing Address		Type of Work (See Reverse Side for Codes)
Name of Business	Contact Person	Phone ()
Mailing Address		Type of Work (See Reverse Side for Codes)

Use additional pages, following the same format, if necessary.

FORM B (continued)

A-1	Engineering - Professional services such as design or construction inspections performed by an engineering firm.
A-5	Other - Other professional services such as supportive services and research contracts.
B-1	Grading/Drainage - Grading, drainage, clearing, and related construction items.
B-2	Paving - Construction of base course, pavements, and related items.
B-3	Structures/Buildings - Bridge construction operations, including piling, substructure, superstructure, etc.; and building construction, including plumbing, heating, electrical, etc.
B-4	Trucking - Hauling of earthwork or other materials for a construction project.
B-5	Traffic Control - Permanent traffic control items such as signs, signals, and markings; and temporary traffic control items such as barricades and flagging.
B-6	Landscaping - Landscaping, seeding, sodding, erosion control, and related items.
B-7	Other - Other construction activities such as lighting contracts and guardrail.
C-	Supplies - The packaging and shipment of a product (materials, goods, and supplies) and the furnishing of BULK ITEMS which are incorporated into a construction project. <div style="display: flex; justify-content: space-between;"> <div> C-1 Aggregate C-2 Concrete C-3 Electrical C-4 General </div> <div> C-5 Petroleum Products C-6 Pipe C-7 Ready Mix </div> </div>
D	Manufacturing - The physical production of materials and supplies through standard manufacturing processes obtained by a contractor for incorporation into a construction project.
E	Equipment - Purchases and rental of equipment for use on a specific construction project.

The DBE Liaison Officer can be contacted at:

CIVIL RIGHTS OFFICE
ND DEPT OF TRANSPORTATION
608 E BOULEVARD AVE
BISMARCK ND 58505-0700

E-mail: digoe@state.nd.us
Phone: (701) 328-2576
Fax: (701) 328-1965

NOTIFICATION OF INTENT TO USE DBE (RC)North Dakota Department of Transportation, Civil Rights Office
SFN 52752 (Rev. 12-2002)SP DBE -- Race-conscious
January 2, 2003
Page 19 of 19**FORM C**

1. The prime contractor and any subcontractors who listed DBE Participation on Form A **must** complete a Form C for each of their respective, intended DBEs. The prime contractor is responsible for the completion and submission of a Form C for each DBE commitment made by any lower-tier subcontractor.
2. If the information on a Form C **differs** from the information provided on Form A (bid item numbers, quantities, or dollar amounts), a written explanation for the difference **must** be provided by the prime contractor or subcontractor with the Form C.
3. The Form C **must be signed** by the prime contractor or subcontractor and their respective, intended DBE. If Form C contains additional pages or an attachment, each page **must** be signed by the intended DBE. Signatures do not have to be original (faxed signatures are acceptable).
4. The forms **must** be returned to the NDDOT Civil Rights Office **within ten working days** after the bid opening. Forms may be faxed to the Civil Rights Office at (701) 328-1965, followed by a hard copy. **Award will not be made** until a Form C is received for each intended DBE listed on Form A.

This form is NOT a contract and does not take the place of any contract. It is an indication to NDDOT that all DBEs listed on Form A understand they will be used on this project.

Prime Contractor or Subcontractor	Project No.	
Intended DBE	Bid Opening Date	Job No.

Bid Item Nos.	Work Description	Units	Approx. Quantity	Unit Costs	Amount
	Total				

Comments

Prime Contractor/Subcontractor Signature	Title	Date
Intended DBE Signature	Title	Date

The NDDOT DBE Liaison Officer can be contacted at the Civil Rights Office, ND Department of Transportation, 608 E. Boulevard Ave., Bismarck, ND 58505-0700, digoe@state.nd.us, phone (701) 328-2576, or fax (701) 328-1965.